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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

against

BENNE KATZ, ALFRED FINKEL and MURRAY KATZ, d/b/a WILLIAMSBURG STEEL PRODUCTS COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Questions Presented

1. Whether, in the context of a continuing impasse and ultimate breakdown of negotiations, both caused by the union, an employer violates Section 8 (a) (1) and 8 (a) (5) of the National Labor Relations Act by following its long-established standard practices known to and discussed with the union during collective bargaining, of granting merit and automatic wage increases and adjusting sick leave policy.

2. Whether such actions constitute *per se* and *separately*, a "refusal to bargain collectively" in violation of Section 8 (a) (5), and hence, also constitute "interference, restraint or coercion by an employer" in violation of Section

8 (a) (1), where the Board expressly refuses to find that the employer had "failed to bargain in good faith," as required by Section 8 (d).

3. Whether, in order to support a finding of an employer's "failure to bargain in good faith", the Board may conclusively infer such failure solely from the facts of the alleged unilateral actions, or is required to rest such determination upon a subjective evaluation of the employer's attitude, manifested during the entire period of the bargaining process and fairly reflected as an ultimate fact by the totality of bargaining negotiations, in accordance with the criteria laid down by this Court in *N.L.R.B. v. Insurance Agents International Union*, 361 U. S. 477.

Introductory Note

The Board's statement (Brief, pp. 2-8) presents only those excerpts from its Findings and from the Record which describe *in vacuo*, the Respondent's unilateral actions. Large segments of the testimony establishing Respondent's good faith bargaining (manifesting its sincere desire to reach agreement), the preceding circumstances and immediate negotiating background at the time such actions were taken, are omitted. Likewise omitted is the testimony showing the union's obstructions, vacillations, oscillations and bad faith bargaining which brought about the impasse and breakdown of negotiations. No mention is made of the fact that it was the union which broke off negotiations or that the union rejected Respondent's offer to submit the whole dispute to the American Arbitration Association. The Board ignores the whole situation regarding the Aetna "most favored nation", clause.

Such omissions are hardly calculated to show the *total picture*, in whose complete factual framework alone Respondent's alleged unfair labor practices may be judged. A fair and responsible presentation of the activities of

Respondent in connection with its dealings with the union during the period in question, requires, we submit, a full and *unabridged record of the totality of the negotiations*—, viz: *all of the collective bargaining events.* For we stress at the inception, that the central issue here is, whether the Court of Appeals was right in applying the criteria laid down by this Court in *N.L.R.B.* v. *American National Insurance Co.*, 343 U. S. 395 (1952), and more specifically, *N.L.R.B.* v. *Insurance Agents Int. Union*, 361 U. S. 477 (1960), that the presence or absence of "good faith" must be tested and determined within the framework of the entire bargaining situation and not in the light of specific, isolated acts, and that the Board must weigh any inference unfavorable to the Respondent as part of the totality of inferences which may be appropriately drawn from its entire conduct.

The decision here should not revolve around the unilateral actions of the Respondent *per se* and *unexplained.* The Respondent may not be condemned, we submit, on the mere unexamined or unexplained ground that it "took unilateral actions." This proposition constitutes, in fact, the true thrust of the opinion of the Court of Appeals which, we submit, was clearly right in its reading of the legislative and decisional law background of the underlying problem here of fixing the criteria for determining the ultimate fact of "good faith" in collective bargaining, where "unilateral" actions of an employer are in question.

It becomes necessary, therefore, to review the full story of the misbehavior and bad faith bargaining of the union from the inception of negotiations in August 1956 until the breakdown in May 1957. The Board's statement omits or subordinates the salient facts establishing the union's guilt in creating such impasse and producing the breakdown in negotiations. It minimizes or ignores the contrasting facts of the Respondent's patience, forbearance and genuineness of its bargaining in each of the numerous conferences to the very end in May 1957.

More importantly, the Board ignores the effect of *the conceded good faith bargaining of the Respondent as found by the Board itself.* It is our submission that it is within this full and unslanted framework that the correctness of the opinion of the Court of Appeals must be tested.

The Record Summarized

1. It is undisputed that there was a series of genuine impasses and a breakdown of negotiations.

2. These were wholly and solely the fault of the Union. They resulted from its vacillations as to individual or association-wide bargaining and its unlawful insistence that Respondent accept the Aetna Steel contract, containing the "most favored motion" clause, a subject outside the scope of mandatory bargaining. The Union charged Respondent with refusal to bargain on individual company basis, but, *at its own request,* conducted negotiations on *an association-wide* basis.

3. The Union eventually instigated turmoil in Respondent's shop, creating a further barrier to bargaining.

4. Respondent, literally, never "refused to bargain"; literally, never refused to "meet and confer" sincerely on any or all issues; it, literally, never "interfered with, restrained or coerced" the employees in the exercise of their rights under the Act. The record is overwhelmingly to the contrary.

5. The employees repudiated the Union after its vacillations, changes of position and failure to conclude an agreement.

6. The Board expressly refused to find that Respondent did not "bargain in good faith." The Board found only violations with respect to specified unilateral acts.

7. On a fair appraisal of the full story, it was not Respondent, but the Union, which was guilty of bad faith bargaining.

8. In the circumstances, Respondent was legally justified (under applicable decisional law, as well as Board rulings) in granting normal merit increases, modifying (not diminishing) sick leave policy, both in accordance with past practices, and setting up an automatic wage increase system. Indeed, the Union had *demanded the continuance* of all these "prior benefits," eventually precipitating a strike vote.

9. After a lapse of five and a half years (since July 5, 1956 when the Union was certified) enforcement should be denied, unless the Board orders an election to determine whether the Union at present represents a majority.

The Record Fairly Presented

1. Approximately 50 to 60 employees were within the subject unit (II-248).* The Union had been certified on July 5, 1956 *after a consent election* (I-44, 45).

2. Respondent, together with a number of other steel fabricators, has for many years been a member of the Hollow Metal Door & Buck Association, Inc. (I-48).

3. The records of the Board will reveal that in the certification proceedings affecting members of this association, the employers contended that it should take place on an industry-wide and/or association-wide basis.

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* References are to the volume and page number of the Transcript of Record. Volume II contains the Appendix to Respondent's brief, consisting of portions of the testimony before the N.L.R.B. The Board's references are solely from Volume I, consisting of testimony it selected for its own Appendix; Volume II is ignored in the Board's brief.

4. However, the Board sustained the Union in its contention and ordered elections upon Respondent's consent and certifications on a shop-by-shop basis rather than on an industry-wide basis. The employers loyally complied with this ruling. Individual certifications were obtained in the employer-member plants, all on a consent basis.

5. Despite the Union's successful demand for individual negotiations, it reversed its position and submitted a list of demands to all of the employers (G. C. Ex. 9, I-52, 261; G. C. Ex. 10, I-263). This was followed by a joint labor-management meeting consisting of representatives of the Union and a negotiating committee representing various employers for whom certifications had been issued.

6. Thus, at the very outset, the Union commenced its misleading tactics—it began industry-wide negotiation despite its original insistence on individual company negotiation.

7. Note especially that the complaint charged Respondent with a failure to bargain individually, despite the negotiations, which, at the Union's insistence, were commenced on an association rather than on an individual company basis (I-96).

8. On August 30th, 1956, in the joint labor management meeting negotiations began on an industry-wide basis. Many items were reviewed and some understandings arrived at (I-231-244).

9. On October 2, 1956, this was continued with some results in favor of the Union (I-245-250).

10. On October 10th, further negotiations took place and the Union obtained many concessions (I-251-260).

11. On October 18th, classifications or automatic progressions and other subject matter was discussed, par-

ticularly a clause requiring the preservation of "previous benefits" granted employees and this was accepted (I-63-69; II-265-271).

12. On October 24th the meeting lasted until 1 A. M. (II-272).

13. It was obvious that by this time, despite intensive discussion and continual increased demands by the Union (some of which were conceded), that no major progress had been made because of the Union's intransigence.

14. On November 1, 1956, following a heated discussion, a "package proposal" of the employers was rejected by the Union in a most discourteous and obnoxious manner. The Union itself had requested this package proposal. Furthermore, the Union turned down the offer to engage in individual bargaining (II-273-276).

15. Evidently the Union's representatives thereafter had a change of heart for the Union again reversed its position and requested individual bargaining on job classifications. Respondent agreed with the Union to meet on November 14th (II-38). Thereafter a lengthy meeting was held between Halpern, the chief engineer of Respondent and the Union representatives and its shop-committee. Again the Union manifested an inflexible attitude. Finally the Union representative injected intemperate remarks accusing Halpern of "Un-American" methods in handling negotiations. The Union representative had been offered no provocation to justify such outbursts. The meeting terminated without further action (II-38-41; 52-53).

16. On December 5, 1956, at the Union's request, an association-wide management meeting was held at the New York State Mediation Board. Mr. Howard Gamser represented the Board. All employers were represented, as well as employee representatives from the shops and of

the employer-members. Gamser suggested that the Aetna Steel Products agreement, which was then in the process of being negotiated individually, be completed so that its contents could be ascertained. A recess was taken in order to clarify the Union's position regarding its agreement with Aetna Steel (I-74-75; II-279-280).

17. By January 1957 the Union had already caused an impasse, because at this stage the Union began to insist on imposing on the Respondent the form of contract which it had entered into with Aetna without consulting the Respondent or the other employers. The Union had dealt with Aetna on an individual basis. This contract contained "the most favored nations clause," which precluded the negotiation of any collective agreement with any other employer in the Hollow Metal Industry containing terms and conditions different than those embodied in that contract (Respondent's Exhibit 2, I-280). (*It is important to note that in its Brief, the Board ignores the whole situation regarding the Aetna agreement.*) The Union's obstinate insistence on this contract thus created an impassable barrier which was never overcome during the remaining negotiations. The Union persisted in its "take it or leave it position." The Aetna Company would not allow any one of its competitors, principally Respondent, to sign a collective agreement better than that embodied in its own agreement. But the working conditions and general labor pattern in Respondent's plant were entirely different from that in Aetna Steel. Aetna had its production employees in its plant at Pottsville, Pa. and its drafting and listing department in New York City. Respondent had its plant as well as the latter department in Brooklyn. Thus, the Aetna form of contract which the Union attempted to impose on Respondent and the other employers was wholly unsuitable and unrealistic for them. In any event, such contract was wholly outside the scope of mandatory bargaining, and the Union persisted unceasingly in its attempts to impose this contract as a condition to signing

an agreement. On March 16, 1957, Respondent plainly set forth its position on the sick leave plan in a letter to the Union (1-269-271, G.C. Ex. 17).

Negotiations continued on March 29, 1957, at the New York State Mediation Board. Some progress could have been made, but it was blocked by the Union's warning that nothing but the Aetna Steel contract containing the "most favored nations clause," would be considered. There was no indication of any waiver or relinquishment of rights by Aetna under its contract, so that a variation from its terms and conditions could be discussed as a basis for further negotiations with the other employers, including Respondent. Negotiations now continued on an industry-wide basis, with all the employers represented by a shop committee of all the shops in question, with Mr. Gamser of the New York State Mediation Board presiding. But the Union's obduracy on the Aetna Steel contract made further negotiations seem useless (I-77; II-21-26, 30-32, 290-292, 402a, 605a-606a).

18. Nevertheless there was another meeting on April 4, 1957 (again at the State Mediation Board with Mr. Gamser), on an industry-wide basis. *The employers, including Respondent, now improved their offer.* They suggested a three-year agreement and across-the-board increases of $7.50 for the first year, $5.00 for the second year, $5.00 for the third year, automatic progressions up to $90, a seniority formula, etc. In addition, proposals were made by them for holidays, vacations and sick leave. It was pointed out that all this went far beyond what most of the plants required since they were unorganized and had no collective agreements. These additional concessions would have imposed further burdens on the employers. In the face of these substatnial concessions, the Union continued obstinately to demand the Aetna Steel agreement on a "take it or leave it" basis. That meeting was beclouded by a strike threat (II-32-36; 229-230; 370-371; 384-385).

19. In fact, the strike vote was taken in the afternoon and evening of April 4, 1957 immediately after this joint meeting. Plainly this aggravated the impasse and made further negotiations seem futile (II-299-302).

20. All of the employers were notified that a strike vote had been taken. In the meantime there had been an exchange of correspondence between the Union and Respondent in March 1957, relating to claimed modifications of the sick leave benefits which had been in effect for the employees in question. This had been strongly disputed by Respondent (I-268; G.C. Ex. 16 (268); Ex. 17 (269); II-7-12, 282-287; 300-302; 303-304; 399; G.C. Ex. 19 (399); G.C. Ex. 29 (415)).

21. On April 11, 1957, the employers continued on an association basis to negotiate at the New York State Mediation Board. *The employers made further concessions,* but the Union remained inflexible and persisted in demanding the Aetna agreement. The Union by this time had already threatened a strike (II-36). On April 16, 1957, the Union filed a charge with the Board which is the basis of the instant proceeding (I-1). But in this atmosphere of rising tension, negotiations continued even after the filing of these charges.

22. The charge regarding sick leave changes was shown by Respondent to involve a specious issue and was distortedly presented by the Union as "discrimination" against the unit. Sick leave plan and policy had been continuously changed in the past since 1948 (I-117-121). These benefits under the changes of March 1957, were not reduced. In fact they were increased and benefited not only the employees in question but upwards of 300 others not in the unit. The purpose was to discourage continued absenteeism and disruptions of production by modifying the sick leave plan. The plan discouraged malingering and rewarded attendance on the part of employees. This is

common industrial practice and reflects well-established methods to cope with absenteeism. Respondent never intended to take away or reduce any sick leave rights. Nevertheless this issue was exploited by the Union to aggravate the already difficult situation (II-287-289).

23. On April 19, 1957, the Union sent a highly intemperate and vitriolic telegram to Respondent charging "Nazi tactics." Since the telegram became common knowledge, this unquestionably was done in order to embarrass and disparage Respondent in the eyes of its employees. This provocation became a serious issue since the Union refused to apologize. Despite this insulting behavior, the employers reluctantly agreed to continue negotiations (II-54).

24. On May 1, 1957, another meeting at the Board on an industry-wide basis, was held. Once more the Aetna agreement was demanded by the Union. At this meeting the employers put forward their own form of agreement on an industry-wide basis, submitted it to the Union and to the Board, prior to the next meeting on May 13, 1957 (II-304-308; G.C. Ex. 26 (403)).

25. On May 13, 1957, in the face of the mounting tension, strike threats, the inflammatory and violent attitude and unyielding position of the Union, the Mediation Board's representative "was ready to throw up his hands." *Once again the employers improved their money offer* which would have greatly increased their costs in the face of uncertain conditions, but the Union remained adamant and wanted only the Aetna agreement. The Union threatened an immediate strike which in fact followed this meeting at the plant of the Pioneer Fireproof Door Company whose representative had participated in the meetings. In a desperate effort to stave off a strike and to prove their good faith, the employers offered to submit the whole matter of the contents of the collective agreement to the Ameri-

can Arbitration Association (Resp. Ex. 12, I-284). This offer the Union rejected and insisted that arbitration be conducted only by the State Mediation Board. The employers felt, with due respect to the Mediation Board, that it could not render an objective award since it had participated intensively in this dispute by way of mediation. The employers contended that a fairer and more objective forum for such arbitration would be the American Arbitration Association whose facilities, procedures and integrity were unsurpassed. Nevertheless, the Union rejected this offer (I-264-274; G.C. Ex. 28 (272); 280-283; II-306-308-312).

26. On May 17, 1957, the Union by a letter to the employers, including Respondent, again demanded individual bargaining. Respondent answered on May 21, 1957. No reply was ever received by Respondent to its letter, nor was any further attempt made to arbitrate under AAA auspices. The Union failed to give any indication that they intended to pursue individual bargaining demanded in their letter of May 17th. Nothing further was ever heard about the matter. In fact, the Union never wrote asking for resumption of negotiations (I-223; II-310-312).

27. It is important to note that the delay in negotiations between December 5, 1956, and March 29, 1957, was prompted by the suggestion of the State Mediator, in which the Union joined, that they attempt to complete the Aetna agreement and that after such completion, the parties would resume negotiations on an industry-wide basis. The fact is that (although it could not be known to the employers), by this delay and by the insertion of the "most favored nation clause" in the Aetna agreement, the Union was providing itself with a basis to obstruct further negotiations by obstinate insistence on this clause (I-74-75, 94).

28. It is significant that in connection with the Union's alleged objections to unilateral wage revisions and merit

increases, the testimony appears very general, with no letters being written or notes or memoranda on that subject being taken by the Union, as was the custom. This absence of record-making and correspondence was inconsistent with the general pattern of the Union's activities in constantly writing letters, memoranda and minutes (I-82-86).

29. Respondent showed that it had been in the steel fabricating business in a substantial plant for many years, had a history of dealing with many unions, local and international (II-247-249).

29(a). The Board in its Brief (pp. 4-5) misrepresents the circumstances under which "joint reviews on the merits" were to be held and merit increases given. No agreement was ever reached on merit reviews (I-245) but merit increases had to be continued—these could not be stopped because they had long been built into the wage structure.

30. Respondent had a long-standing pattern of job classification, merit reviews, upgrading promotions, periodical across-the-board increases, and sick leave provisions. Merit reviews were *true* merit reviews and had been made since 1950. Some employees were given more than others. Some were given no increases. The work pattern of each employee was carefully considered before granting them. These could also have been re-classifications or promotions. As to pensions, it was shown that this matter had been discussed with the employees in the Union in question for many years prior to the advent of this Union, Local 66, and not only for this group of employees, but for all 300 white collar personnel. These merit increases were made at the usual time, the middle of April. But by this time there had long been an impasse in the negotiations and the August 1957 increases came long after the impasse (1-100-102; 103-105; 107-108; 113-115; 160-166; 177, 178, 179; 187-189; 190, 191, 192) (II 82; 108-109; 226-227; 238; 240-243; 246-255).

31. During the certification period between July 1956 up through July 1957, there had been constant stoppages, meetings, caucuses during working hours, disturbances and tensions—precipitated directly by the chaos and confusion brought on by the antics of the Union during this period. As a consequence, many scheduled and irreplaceable employees were lost within the bargaining unit, further aggravating the disorder in Respondent's operation (I-180-181; 190; II-62-63; 78; 111-112; 113-118; Resp. Ex. 7 & 8; 225; 233-234; 432-433).

32. Respondent made an offer of proof to show that such a campaign of slowdowns and work stoppages had been inspired by the Union's representatives. This offer, in our view, was improperly rejected by the Trial Examiner. Such testimony would have unquestionably substantiated the affirmative defenses asserted by Respondent, that these resulted from the Union's disruptive conduct and deliberate attempt to prevent the signing of any collective agreement except on such terms as it wished to impose (II-149-152; 228-230; 234-235).

33. The employees as well as members of the Union completely changed their position and attitude towards it. This was demonstrated when they were called as witnesses on behalf of General Counsel for the Board. These employees explained the reasons for the alienation of their feelings towards the Union and why they believed it could no longer be claimed to represent them as a collective bargaining agent. A former staunch adherent of this Union, who later became president of the employees' association, testified that by July 1957 the employees wanted no part of Local 66. In fact they were determined under their own auspices to petition the Board for a new election to determine the bargaining representative. All of these witnesses had given statements to some persons in the Board. These statements they seriously disputed. This would seem to indicate that these statements did not

truly reflect all of the transcript given to the Examiner. They appeared to be incomplete and inaccurate portrayals of their position. These statements were introduced over strenuous objections of Respondent on the ground that they were used to impeach the credibility of witnesses who had been called by General Counsel as his own witnesses. In these circumstances the probative value of these statements must be considered as *nil*. It should be specially noted that the Union throughout the negotiations demanded a "prior benefits clause." This clearly indicated that the Union itself was demanding that the historical pattern of wages, classifications, promotions, merit reviews, etc. be continued. Respondent would have been on the horns of a dilemma if it had dared to deny such benefits (I-121-144; 147-150; 151-159; 159-173; 194-202; II-112-118; 120; 138-159; 166-184; 216-240).

34. Much of the testimony admitted by the Trial Examiner related to events after July 1957, which was subsequent to the end of the certification year of the Union (II-72-80). The Trial Examiner made a great point about a meeting of Halpern and Jacobson with the employees during July 1957, relating to pensions, a subject which had been discussed long before the Union came on the scene and the question decertifying the Union (I-23). The employees were not paid for this meeting (I-145-150; 151-173; 181) and it was held after hours (II-160). They were dissatisfied about the payment of strike assessments (II-60-62) and lack of union action (II-78-79). Employees were interviewed by Board officials on company time (II-60-62) and lack of Union action (II-78-79). Employees of the Union and part of the unit in question had severed their ties, with the Union, of their own volition. These employees had petitioned the Board for the right to act as the bargaining representative for the unit of employees in question in dealing with Respondent. (See *Stoner Rubber Company, Inc. and Local 629 International Chemical Workers Union*, 123 N.L.R.B. No. 152).

Summary of Argument

1. Unilateral actions of an employer may not be condemned as violations of Sections 8 (a) (1) and 8 (a) (5) without an examination of all the circumstances comprising the totality of bargaining activity during the whole period of negotiations, in the setting in which these actions were taken. Such actions may not be plucked from the context of the whole story of the bargaining and negotiations and arbitrarily treated by the Board as isolated phenomena, to be branded illegal *per se*, thus depriving an employer of his right of explanation and justification of such actions.

2. Where, as here, the record establishes that the Union caused an impasse and a breakdown of negotiations (despite protracted but unsuccessful "meetings and conferences" at which sincere efforts were made by the employer to reach agreement), specific unilateral actions by themselves, do not make an employer guilty of "refusal to bargain" in violation of Section 8 (a) (5), unless the Board expressly finds in addition that the employer failed to bargain in "good faith," as required by Section 8 (d).

3. Such a finding of the ultimate fact of "good faith" (or bad faith) of an employer rests upon a subjective evaluation by the Board of an employer's mental attitude which can only be effectively determined in the light of and within the framework of the complete bargaining situation.

4. The Court of Appeals was therefore clearly right when it remanded the case to the Board for additional evidence and held that the Board may not, without more, conclusively determine and draw the inference, from the isolated fact of a unilateral change, of a failure to bargain in "good faith," and a consequent violation of Section 8 (a) (5), unless the employer is first given an opportunity

to rebut such inference by submitting evidence of his state of mind during the negotiations and to lay the basis for a finding that he was (or was not) legally justified in taking such action.

5. Both the Congressional history of the enactment of the "good faith" test of collective bargaining set out in Section 8 (d) as well as the decisions of this Court, particularly *N.L.R.B.* v. *Insurance Agents International Union*, 361 U. S. 477 (1960), support the rejection by the Court of Appeals of the *per se* principle urged by the Board.

6. In the light of the Board's express refusal to find that Respondent failed to bargain in good faith, *Insurance Agents International Union, supra*, is the controlling precedent here. *Medo*, 321 U. S. 678 (1944), and *May Department Stores*, 326 U. S. 376 (1945), were both decided before the enactment in 1947, of Section 8 (d) (the "good faith" test); also their facts are patently dissimilar from the situation in this case. Since in *Crompton-Highland Mills*, 337 U. S. 217 (1949), (the Board's chief reliance) the Board *had expressly found* that the employer had failed to bargain in good faith, that case is manifestly inapplicable here. The requirement of proof of "good faith" by a determination of the state of mind of an employer is founded on the salutary policy of the need to restrain the Board's power to control arbitrarily the setting of the terms of collective bargaining. *N.L.R.B.* v. *American Nat. Ins. Co.*, 343 U. S. 395 (1952).

7. Violations of Section 8 (a) (1) (interference) and Section 8 (a) (5) (refusal to bargain) are not two, conceptually distinct and severable infringements of the Act. Therefore, a Section 8 (a) (1) violation may not be found independently of a Section 8 (a) (5) violation.

8. The necessary concomitant and condition precedent for a finding of violations of both Sections 8 (a) (1) and

8 (a) (5) as well as the ultimate, all-encompassing and sole criterion by which to determine an employer's violation of both sections, is a finding that he has not complied with his obligation to bargain collectively in "good faith" (Section (8) (d)).

9. The inordinate delay of five years and eight months (since July 1956) in canvassing the present wishes of the employees requires denial of enforcement, unless the Board orders an election to ascertain whether the Union is presently their choice.

POINT I

The Court of Appeals was right in refusing to apply the discredited "per se" principle to a specific violation of Section 8 (a) (5) of the Act and, derivatively, of Section 8 (a) (1), without an express finding of the Board that Respondents failed to act in good faith. Its decision to remand for further evidence, as a basis for a subjective evaluation of the Respondents' attitude in terms of the complete bargaining situation, to support a finding of good faith, is consistent with the legislative history of the "good faith" test in Section 8 (d) and the controlling doctrine on that subject, as set forth in *Insurance Agents International Union*, 361 U. S. 477 (1960).

The Board urges upon this Court that the "good faith" requirement of Section 8 (d) should play little part or be subordinated (if not wholly discarded) as the ultimate or overriding criterion for determining whether any Section 8 (a) (1) and 8 (a) (5) violations have occurred. It repeats its adherence to and insistence upon the "per se" principle as the sole and exclusive measure of Section 8 (a) (1) and Section 8 (a) (5) violations (Brief, pp. 13,

20, 31, 33, 36, 37). It is our submission that the Board's approach once again "* * * must be *taken as proceeding from an erroneous view of collective bargaining.*"*

In practice, the Board has frequently found "failure to bargain in good faith" merely as a consequence, i.e., as *a conclusion of law,* following *findings of fact* relating to Sections 8 (a) (1) and 8 (a) (5) violations.** It resists the requirement now placed upon it by the Court of Appeals that such finding of "failure to bargain in good faith" *must be truly one of fact,* based on substantial evidence as to the state of mind of the party charged with the violations, and not an incidental consequence in the form of an unsupported conclusion of law, devoid of evidentiary content, and added to its decision and order merely to satisfy the definition of collective bargaining set out in Section 8 (d).

We believe that the Court of Appeals was right in laying down that the finding of "good faith" must be a positive (not a passive or formal component) of a decision and order of the Board. Indeed, as we read the decision of the Court of Appeals, it must be a condition precedent and concomitant to a determination that Sections 8 (a) (1) and 8 (a) (5) violations have occurred. To require the Board to make a determination of subjective state of mind, will protect both employer and Union from arbitrary action by the Board.

On the other hand, to sustain the Board's view, would be to sanction its intrusion into the substantive aspects of the bargaining process in violation of the basic national

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* This was Mr. Justice Brennan's criticism of the Board's approach in *N.L.R.B.* v. *Insurance Agents, supra.*

** *N.L.R.B.* v. *Katz,* 289 F. (2) 700, 709.

policy that the Board avoid exercising any influence upon the terms on which the parties contract.*

In any event, the Board's urging this Court to validate a revival of the "per se" principle, is not only directly contrary to the doctrinal trend of this Court away from "per se" conceptualization,** but is opposed, as well, to its own recent policy declarations and decisions, renouncing the "per se" approach. We find the attitude of the Board in the case at bar hard to reconcile with the statements that Member Brown made in a recent address.***

Adverting to this Court's setting aside the Board's *Mountain-Pacific and Brown-Olds* doctrine on April 17, 1961, Mr. Brown stated at page 10:

> ". . . Under these Supreme Court interpretations, hiring hall arrangements *were no longer illegal 'per se.'* Evidence of discrimination rather than an automatic presumption was necessary to find an unfair labor practice. Furthermore, even assuming the existence of an unlawful closed shop arrangement, em-

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* *Insurance Agents, supra*, pp. 488, 489, 497, 498, 499. As the Court of Appeals stated, 289 Fed. 2nd 700, at p. 707: "* * * If the N.L.R.B. were given the power to involve itself with the myriad specific acts that make up a labor management negotiation, we would no longer have employer-employee negotiation but enforced governmental arbitration * * *." See also Cox, *"The Duty to Bargain in Good Faith,"* 71 Harvard Law Review, 1401, p. 1440 (1958), where the opinion is expressed that "* * * surely a quasi-judicial agency ought not to engage in an effort to readjust the balance (in collective bargaining) *under the guise of statutory interpretation* * * *." (Emphasis supplied)

** In *N. L. R. B.* v. *News Syndicate Co. Inc., et al.*, 365 U. S. 695 (Apr. 1961), this Court agreed with the Second Court of Appeals (279 F. (2) 323), that a "General Laws" provision of a contract was not "per se" unlawful.

*** *"The N.L.R.B. on the New Frontiers"*—Address by Gerald A. Brown, Member, National Labor Relations Board at Institute on Labor Law, Duke University Law School, Durham, North Carolina; February 9, 1962; pp. 10, 12, 13, 14, 15.

ployee union members were no longer *automatically* entitled to reimbursement of union dues and initiation fees. Evidence that union membership was influenced in violation of the Act was now an indispensable element.

"In a word, the bubble had finally burst and with it these so-called 'per se' rules floated to their timely demise.

"I attach particular significance to the Supreme Court's *aforementioned tacit indictments of these 'per se' rules*, perhaps as much because they coincided with my appointment to the NLRB as because they echo my emphatic belief that *independent analysis on a case-by-case basis must be substituted for mechanical rules.*

"Other Federal Courts have likewise had occasion to criticize the creation and application of rigid rules. "The Fourth Circuit, in *N.L.R.B.* v. *Pittsburgh Plate Glass Co.* stressed the need *for modifying the 'per se' approach* to unit problems and then went on to say that Section 9 (b) (2) '. . . *frees the Board from the denomination of its past decisions and directs it to reexamine each case on its merits* and leaves it free to select that unit which it deems best suited to accomplish the statutory purpose."

At page 12:

". . . Indeed, when viewed as a whole, in my opinion, the *Board's most recent decisions depict a definite*

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* When a Union directed employees to refuse to work overtime and to engage in intermittent work stoppages during bargaining negotiations in order to force the company to agree to a contract, the Board reversed its trial examiner because of the *Insurance Agents* case and held that such tactics were not *in and of themselves* a violation of Section 8 (b) (3). Local 220 I.U.E., 127 N.L.R.B. 1514 (1960).

movement away from the rubber stamp approval of 'per se' rules. This trend has manifested itself in an impressive variety of representation and unfair labor practice cases. Among the most significant contributions to modification of the 'per se' approach in representation cases is the *Sheffield Corporation* case. . . ."

At page 13:

"The case-by-case approach also was adopted in the recent American Cyanamid decision. After reconsidering the question of whether a separate unit of maintenance department employees was appropriate in situations where another union sought an over-all industrial unit of the production and maintenance employees, *the Board demonstrated once again its determination to avoid 'per se' rules* by specifically concluding that the mere absence of a bargaining history in a production and maintenance unit would not, *ipso facto,* establish the appropriateness of a maintenance unit.

"Many fixed rules with respect to allegedly objectionable preelection conduct have fared no better. *Their disappearance marks another step forward in the Board's assault on 'per se' thinking.*"

At page 14:

"Summing up this trend in general terms, I would say that the *present Board has freed itself from the self-inflicted dedication to 'per se' rules* which had effectively, though perhaps unwittingly tied the hands of the predecessor Board. It is hoped that this resurrected freedom to act on the merits of individual cases will enhance responsible decision making and better enable the Board to serve the public interest which the Act has intended to promote. . . ." (Emphasis supplied)

While publicly repudiating "per se" thinking, the Board continues to base its position here on a regressive and unrealistic view of collective bargining.*

Respondent submits that in the light of the doctrine of the "totality of negotiations," as set forth in *Insurance Agents International Union, supra,* by this Court, the "per se" principle of determining violations of the Act no longer has current vitality. As indicated in that case, for the purposes of legal analysis and of determining alleged violations of the Act and the interpretation and application of Sections 8 (a) (1) and 8 (a) (5), collective bargaining must be viewed as a *unitary,* not as a *fragmented,* process. The Board's exposition of the "philosophy of collective bargaining, of the Act and of decisions of this and other Courts" (Brief, pp. 23; 28; 39; 37) is a misreading and distortion of the realities of present-day industrial relations and of the evolution of the collective bargaining process since 1935.

Collective bargaining, realistically (until an impasse ends the process), is an unbroken, interrelated, intermeshing *continuum* of conduct and activity by management and the union, *vis-a-vis* each other.**

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* Students of collective bargaining have concluded that the future of this basic process depends on maximum flexibility in adjusting to changing times and conditions and that wide latitude should be preserved in good faith negotiations without government interference; R. W. Fleming, *"The obligation to bargain in good faith",* 47 Virginia Law Review, 988-1013 (1961).

** Indeed this was the earlier view of the Board when it stated that the essence of the bargaining process was "* * * interchange of ideas, communications of facts, peculiarly within the knowledge of either party, personal persuasion *and the opportunity to modify demands in accordance with the total situation,* thus revealed at the conference. * * *" (*S. L. Allen and Co.,* 1 N.L.R.B. 714, 728 (1936).) The difficulty and undesirability of isolating any single action which the Board has disapproved, and designating it alone as sufficient to support a finding of a refusal to bargain, without con-

(Footnote continued on following page)

We submit that for the purposes of the Act, collective bargaining must be treated as a *single history made up of many events and episodes.* Neither a single action or a partial, selected group of actions should be seized upon by the Board as conclusively characterizing, legally, the conduct of one of the parties. "Good faith" cannot be fairly and realistically tested or inferred by isolated occurrences of behavior any more than an individual's "character" can be fairly stigmatized in terms of one or a few isolated instances of certain kinds of behavior. The "per se" principle permits the Board (without warrant in the controlling decisional law) to disentangle, excise, and single out from the whole complex of interrelationships constituting the collective bargaining process, a single action (or a selected cluster) occurring at some point during the negotiations between the parties, treat it in isolation, and if deemed by the Board "unfair," bring it within an easy condemnation of Sections 8 (a) (1) and 8 (a) (5). "Unilateral action" is no less an abstraction than is "economic pressure"* and "vital differences in conduct" during

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(Footnote continued from preceding page)

sidering the background of other unfair labor practices, was pointed out as long ago as 1940 by Chester Ward in *"The Mechanics of Collective Bargaining,"* 53 Harvard Law Review, 754, 754 (1940); see also R. A. Smith, *"The evolution of the 'duty to bargain' concept in American Law,"* 39 Michigan Law Review, 1064, 1107, 1108 (1941). The unity and continuity of collective bargaining has always been recognized as the distinctive feature of this dynamic process for solving plant problems. Schulman & Chamberlain, *"Cases on Labor Relations,"* p. 3 (1949); H. W. Davey, *"Contemporary Collective Bargaining,"* pp. 6, 10 (1951). John H. Fleming, Member N.L.R.B., in *"The Changing Pattern of Issues in Labor Relations Cases Before the Board"*, 29 George Washington Law Review, 273 (December 1960) at page 279, stated:

> "* * * Practical labor-management relations people recognize that bargaining is a day to day affair which carries right into the administration of an agreement, and like women's work, is never done * * *".

* *Insurance Agents, supra,* p. 505.

negotiations should not be permitted to become ". . . observed, under cover of a single abstract phrase . . ."*

It is this fragmented and abstract approach to the problem of ascertaining whether unilateral actions constitute violations of the Act, which the Court of Appeals rejected.

That the "per se" approach is no longer valid is made unmistakably clear in the decision of this Court in *N.L.R.B.* v. *Insurance Agents' International Union, supra.* In that case, the Union was charged with engaging in certain concerted activities designed to harass the employer. The Court held that the Union was not barred in engaging in such economic pressures on the employer. While a Section 8 (b) (3) unfair labor practice charge against the Union was there in question, the principles laid down by the Court should apply by analogy to a case involving charges against an employer under Sections 8 (a) (1) and 8 (a) (5). At page 508, Mr. Justice Frankfurter had the following to say about the "per se" doctrine:**

> ". . . The Board's function in the enforcement of the duty to bargain does not end when it has properly

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*The Board here considers Sections 8 (a) (1) and 8 (a) (5) (as it did Section 8 (b) (3) in *Insurance Agents, supra*), in the words of Mr. Justice Frankfurter in that case, at p. 510: ". . . in isolation, as if each was an independent provision of law and not a part of a reticulated legislative scheme, with interlacing purposes. It is the purposes to be drawn from the statute in its entirety, with due regard to all its interrelated provisions in relation to which Section 8 (b) (3) is to be applied. Cf. *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, 456 . . ." (Emphasis supplied).

Respondent submits that this pronouncement should apply with equal force to the employer sections of the Act, Sections 8 (a) (1) and 8 (a) (5).

**The Board, on the last pages of its Brief (pp. 36, 37), almost as an afterthought, attempts to minimize the controlling significance of this decision. We are compelled to quote at length the language of the concurring opinion as the best refutation of the Board's contention that the decision does not stand for the proposition for which the Court of Appeals cited it, viz: that unilateral acts must be "tested within the framework of the entire bargaining situation" (289 F. (2) 700, 707).

drawn an inference unfavorable to the respondent from particular conduct.** It must weigh that inference as part of the totality of inferences which may appropriately be drawn from the entire conduct of the respondent, particularly its conduct at the bargaining table. The state of mind with which the party charged with a refusal to bargain entered into and participated in the bargaining process is the ultimate issue upon which alone the Board must act in each case, and on the sufficiency of the whole record to justify its decision the courts must pass. *NLRB* v. *American Nat. Ins. Co.*, 343 U. S. 395, 96 L. ed. 1027, 72 S. Ct. 824.

"The Board urges that this Court has approved its enforcement of Section 8 (b) (3) by the outlawry of conduct per se and without regard to ascertainment of a state of mind. It relies upon four cases: *H. J. Heinz Co.* v. *NLRB*, 311 U. S. 514, 85 L. ed. 309; 61 S. Ct. 320; *NLRB* v. *Crompton-Highland Mills*, 337 U. S. 217, 93 L. ed. 1320, 69 S. Ct. 960; *NLRB* v. *F. W. Woolworth Co.*, 352 U. S. 938, 1 L. ed. 2d 235, 77 S. Ct. 261; and *NLRB* v. *Wooster Div. Borg-Warner Corp.*, 356 U. S. 342, 2 L. ed. 2d 823, 78 S. Ct. 718. *These cases do not sustain its position.* * * * The Crompton-Highlands decision rested not on approval of a per se rule that unilateral changes of the conditions of employment by an employer during bargaining is a refusal to bargain, but upon the inferences of a lack of good faith which arose from the facts, among others, that the employer instituted a greater increase than it had offered the union and that it did so without consulting the union * * * To the extent that in any of these cases language referred to a per se proscription of conduct it was in relation to facts strongly indicating a lack of sincere desire to reach agreement." (Emphasis supplied)

** Does the Board imply that "unilaterial action" is not "particular conduct"?

On page 511, Mr. Justice Frankfurter, in commenting on Board policy with reference to bad faith bargaining, stated:

> "• • • In the light of that policy there is no justification for divorcing from the total bargaining situation particular tactics which the Board finds undesirable, without regard to the actual conduct of bargaining in the case before it.
>
> "The scope of the permission embodied in Section 13 must be considered by the Board in determining, under a proper rule of law, whether the totality of the respondent's conduct justifies the conclusion that it has violated the 'specific' command of Section 8 (b) (3). • • •"

And further, at page 513, Mr. Justice Frankfurter stated:

> "• • • Section 8 (d), which was added in the amendments of 1947, is also inconsistent with the Board's claim of power to proscribe conduct without regard to the state of mind with which the actor participated in negotiations. The 1935 Act did not define the 'practice and procedure of collective bargaining' which it purposed to 'encourage.' Act of July 5, 1935, Sec. 1, 49 Stat. 449. That definition, until 1947, was evolved by the Board and the courts in the light of experience in the administration of the Act. See e.g., *H. J. Heinz Co.* v. *NLRB*, 311 U. S. 514, 85 L. ed. 309, 61 S. Ct. 320, *supra*. In 1947, after considerable controversy over the need to objectify the elements of the duty to bargain, Sec. 8 (d) was enacted. We have held that the history of that enactment demonstrates an intention to restrain the Board's power to regulate, whether directly or indirectly, the substantive terms of collective agreements. *NLRB* v. *American Nat. Ins. Co., supra* (343 U. S. at 404). In the same case we recognized that implicit in the purpose is a restraint upon the Board's proceeding by the proscription of conduct per se and without regard to in-

ferences as to state of mind to be drawn from the totality of the conduct in each case. Id. 343 U. S. at 409."

The decision of the Court of Appeals here (289 F. (2) 700) has been followed by the Ninth Court of Appeals in *NLRB* v. *Cascade Employer's Ass'n, Inc.*, 296 F. (2) 42, 48 (Oct. 20, 1961) where a factual pattern appeared strikingly similar to the one at bar. After four meetings with the Union, the Association-Respondent caused its employer members to institute unilaterally, certain changes in the working conditions then prevailing under a contract about to expire. The Court held that the Board had made no finding (p. 48) concerning the Respondents' state of mind based on a totality of the evidence. In view of the holding in *N.L.R.B.* v. *Katz*, 289 F. (2) 700 (C. A. 2) (the case here) the Ninth Circuit (p. 48) remanded the case to the Board "in order that it *may take action consistent with Insurance Agents . . .*" (Emphasis supplied)

By a distillation of the legislative history of the "good faith" test (Section 8 (d)) and a perceptive analysis of the evolution toward and explicit adoption by this Court of the "totality of conduct" doctrine in *Insurance Agents, supra*, the Court of Appeals found (289 F. (2) 702, 703) that ". . . in the posture of this case a necessary requisite of a Section 8 (a) (5) violation is a finding that the employer failed to bargain in good faith" and, (p. 709) that the ". . . alleged Section 8 (a) (1) violations are derivative only and that a finding that Section 8 (a) (1) has been violated must be reviewed in the light of the review we have ordered the Board to make with respect to its finding that Section 8 (a) (5) was violated. . . ."

The Court of Appeals (p. 704) exposed the error of the Board in its interpretation of and reliance on three landmark cases of this Court: *Medo Photo Supply Corp.* v. *NLRB*, 321 U. S. 678 (1944); *May Department Stores Co.* v. *NLRB*, 326 U. S. 376 (1945) and *NLRB* v. *Crompton-Highland Mills* (1949), 337 U. S. 217. The Board here repeats its mistaken reliance on these three decisions. All

are patently dissimilar from the situation at bar. In *Medo*, the employer received, as a condition to granting wage increases, a promise from the employees that they would repudiate the Union, their certified bargaining representative. Nothing in the Board's findings remotely resembles *Medo*. In *May*, the employer flatly refused to recognize or bargain with the Board certified Union. In this case, Respondent not only had recognized but had bargained and negotiated with Local 66, *ad nauseam*, until that Union brought on an impasse and itself broke off negotiations.

In *Crompton* (which the Board Brief, p. 29) insists is the "controlling precedent here") there is the glaring distinction that the Board *made an express finding that the Board had failed to bargain in good faith*, whereas, here, the Board expressly refused to make such a finding.*

The Board's "per se" approach would require the treatment of Sections 8 (a) (1) and 8 (a) (5) as *two conceptually distinct and severable infringements of the Act*. But mere enumeration of a list of unfair labor practices in Section 8 does not justify the conclusion that Congress (in the absence of a specific declaration to that effect) contemplated that either the Board or the Courts are to

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* It should be noted that all of the cases cited by the Board (Brief, pp. 14-19; and pp. 33-35, with the exception of *NLRB* v. *Cascade Employers Assoc. Inc.* (*supra*), which expressly followed *NLRB* v. *Katz*, the case here, and *Insurance Agents, supra*), were decided before this Court, in February 1960, had clarified the underlying question here that "good faith" bargaining was not to be determined by the "per se" principle. The Board (Brief, p. 36) attempts to distinguish *American Nat. Ins. Co.*, 343 U. S. 395, where there was no issue before the Court as to the "per se" violative character of unilateral actions, but rather where the Court decided that an employer's bargaining for a management functions clause was not a "per se" violation, in the light of the evidence viewed as a whole. The Board (Brief, p. 36) asserts that ". . . the Court cited in footnote 20, p. 407, cases in which good faith was irrelevant." The two cases there cited, *Inland Steel Co.* v. *NLRB*, 170 F. (2) 247 (C. A. 7), and *NLRB* v. *Allison Co.*, 165 F. (2) 766 (C. A. 6), are devoid of any suggestion that "good faith was irrelevant," or that any such proposition was a factor or played any part in those decisions.

administer or interpret these two sections as if they were such. Indeed, this Court, in *May, supra*, rejected the concept of the *independent violability* of Section 8 (a) (1) when, in discussing whether the Board's order to the employer encompassed more than the facts alleged and therefore was too broad a directive, it stated at page 392:

> ". . . We think that, in the circumstances of this proceeding, although there is a violation of Section 8 (1), as well as Section 8 (5), *the violation of Section 8 (1) is so intertwined with the refusal to bargain* with a unit asserted to be certified improperly, that *without a clear determination by the Board* of an attitude of opposition to the purposes of the Act to protect the rights of the employees generally, the decree need not enjoin Company actions which are not determined by the Board to be so motivated . . ." (Emphasis supplied)

We submit, therefore, that the conclusion to be drawn from *May, supra*, is this: That had the facts giving rise to the litigation there, *not* sustained a finding of a Section 8 (a) (5) violation the *same facts would not* have supported a holding that Section 8 (a) (1) had been *independently* violated.

Even if it be assumed, *arguendo*, that the record could provide a sufficient basis for a finding of an independent violation of Section 8 (a) (1), it is clear that the Court of Appeals acted within its powers when it remanded the case* to the Board for the purpose of reviewing such alleged violation in the light of the review it "had ordered the Board to make with respect to its finding that Section 8 (a) (5) was violated." This complies with *NLRB* v. *Virginia Elec. & Power Co.*, 314 U. S. 469, 476, that where a conclusion of the Board is based heavily on findings that "are not free from ambiguity and doubt . . . the Board, and not this Court should undertake the task of clarification."

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* 289 F. (2) 700, 709.

POINT II

(a) Respondent at all times during the negotiations manifested the sincere desire but was unsuccessful in its effort to reach an agreement with the Union.

(b) The bad faith bargaining of the Union was the sole cause of the impasse and breakdown of negotiations.

(c) In these circumstances, the Respondent, under settled doctrine, was free to take the unilateral actions without violating Sections 8 (a) (1), 8 (a) (5) of the Act.

The Board's position in essence is this: Respondent took certain unilateral actions during and after negotiations; therefore, it has violated Sections 8 (a) (1) and 8 (a) (5). But such an argument starts in midstream—it ignores and bypasses the dominating feature and end-result of nine months of fruitless bargaining, viz: the impasse and breakdown of negotiations. Nor does the Board face up to the critical question which thus appears at the threshold—who caused the impasse and breakdown of negotiations? By avoiding an answer or even recognition of this preliminary question (evidently because the record unmistakably establishes the Union's guilt in this vital regard), the Board wholly misrepresents Respondent's position here. We suggest that without giving due weight *to the fact of the Union's guilt, as the true starting point of the necessary legal analysis to be made here*, this case cannot be viewed in its proper perspective. Respondent, throughout the proceedings before the Board, as well as on the appeal below, established that the im-

passe and breakdown was wholly attributable to the Union.*

As a consequence Respondent's increases and modifications of sick leave became a practical necessity. It had no choice if it was to retain the employees in the unit in question, and to maintain its competitive position in the industry. The effect of the Board's finding of allegedly illegal actions by the Respondent would place an employer in a situation comparable to the Respondent's, in a most inequitable position. It would penalize him unfairly and inhibit and prohibit him from carrying on and maintaining (during the turmoil and continuous impasse created by a Union) favorable work conditions and peaceful relations with his employees, despite strenuous bona fide efforts to continue negotiations and eventually reach an agreement with an unpredictable and obstinate Union.

But more importantly, in the context here described, Respondent had ample legal sanction and justification for taking such actions. These were plainly within the well-established doctrine that generally speaking the freedom to grant an unilateral wage increase is "limited to cases where there has been a bona fide but unsuccessful attempt to reach an agreement with the Union or where the Union bears the guilt for having broken off relations. In such

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* Respondent's persistent assertion throughout and demonstration by its own testimony that the Union bore the guilt for the impasse and the breaking off of relations stands in striking contrast to the situation in *N.L.R.B.* v. *Herman Sausage Co.*, 275 F. 2nd 229 (C. A. 5) (1960), where enforcement was granted when the employer, as an afterthought, had attempted to justify his unilateral wage increases on the ground that an impasse had arrived. Judge Brown at page 234 stated: "* * * *one thing positively clear in this regard is that the employer did not consider that there was an impasse.*" (Emphasis supplied.) The marginal note on page 234 indicates that the employer failed in its exceptions to the Examiner's report "even to mention the idea of an impasse."

In contrast, the core of Respondent's case here, *from the very start of proceedings*, revolved around the impasse caused by the Union.

a situation the employer has fulfilled his statutory obligation and is free to exercise his power of management." *N.L.R.B.* v. *Andrew Jergens Co.*, 175 F. (2) 130, 136 (C. A. 9); cert. den. 338 U. S. 827, reh. den. 338 U. S. 882; *N.L.R.B.* v. *Sands Mfg. Co.*, 306 U. S. 332; *Montgomery Ward Inc.*, 39 N.L.R.B. 229. The record shows that as early as October 1956, and surely by January 1957, a stalemate and hopeless impasse had already developed, due solely to the Union's antics and stubbornness. *Continuous negotiations had brought more and more concessions from Respondent.* But the Union clandestinely entered into an agreement with Aetna, containing "the most favored nation clause" under which it was required to impose identical conditions on all other companies in the industry. This agreement with Aetna, it must be remembered, was entered into without consultation with Respondent. Thereafter the Union insisted on imposing this Aetna contract (which was wholly outside the scope of mandatory bargaining between the parties) on Respondent as a condition to signing an agreement. It was in such circumstances that the stalemate and impasse developed. An impasse by itself does not indicate a refusal to bargain. *Carpinteria Lemon Assoc.* v. *N.L.R.B.*, 240 F. (2) 554 (C. A. 9) 1956; *N.L.R.B.* v. *United Clay Mines Corp.*, 219 F. (2) 120 (C. A. 6), 1955.

But, where, as here, no substantial evidence has been submitted to establish *actual restraint or coercion* by the employer when he makes unilateral merit increases, he is fully justified in doing so if they are in line with his custom and practice. This was the situation in *White* v. *N.L.R.B.*, 255 F. (2) 564 (C. A. 5), where the petition for enforcement was set aside, since bad faith bargaining had not been established where unilateral merit increases had been made. And it is worth repeating that Respondent has not been found guilty of bad faith bargaining

In *Intermountain Equipment Co.* v. *N.L.R.B.*, 239 F. (2) 480 (C. A. 9), the same rule was laid down upholding

bonuses or sick leave where the company had been following its past policy regarding such benefits. The Board itself has frequently recognized the propriety of increases, wage revisions and upgrading where these are part of a standard pattern, *Bishop, et al.*, 121 N.L.R.B. 105; *American Laundry Machine Co.*, 107 N.L.R.B. 316; *Quaker State Oil Refining Co.*, 107 N.L.R.B. 11; *Milwaukee Electric Tool Co.*, 112 N.L.R.B. 142; *Boeing Airplane Co.*, 110 N.L.R.B. 22; N.L.R.B. Gen. Counsel Administrative Ruling No. K-95 (1955). Moreover, the Board has upheld wage revisions, and ruled them to be non-interference when made, as here, in order to retain skilled workers who were hard to replace. *Taylor-O'Brien Corp.*, 112 N.L.R.B. No. 2. We submit that such increases were unimpeachable, especially in the conditions described above, which establish the Union's guilt in bringing on and continuing the impasse in bargaining.

We have difficulty in reconciling the Board's position in this case on the question of the legal justification for unilateral actions where an impasse arises, and the determinations it has made in its own recent rulings. The Board in Case No. SR-114 (August 31, 1959) 44 L.R.R.M. 1540, has recognized that an employer, confronted with and reaching *an impasse created by the Union*, may then grant unilateral wage increases. General Counsel refused to issue a complaint upon the Union's 8 (a) (5) and (1) charges of bad faith bargaining, and held that in view of the impasse reached by the parties on the wage issue, the company did not violate the Act by offering the striking employees a wage increase that the Union had rejected during contract negotiations. The Board stated at page 1541:

> "The company and the Union had engaged in an amicable bargaining relationship for several years. Prior to the expiration of their most recent contract, the parties with the aid of a federal conciliator, met

> to negotiate a new contract. When the parties were unable to agree on a wage increase, the Union struck at the expiration of the contract. During the strike, the parties continued to bargain. When the parties reached an impasse on the wage issue, the company requested the striking employees to return to work, offering them the same wage increase that had been offered by the company and declined by the Union during the negotiations preceding the strike. Subsequently, the company advertised in the newspapers for replacements and hired a number of new employees. There is no evidence that the company failed to bargain in good faith. There also is no showing of any independent 8 (a) (1) violations or Union hostility on the company's part. See *NLRB* v. *American National Insurance Co.*, 343 U. S. 395, 30 LRRM 2147; *NLRB* v. *Crompton-Highland Mills*, 337 U. S. 217, 24 LRRM 2088."

Could Respondent be required to go on indefinitely, engaging in useless and fruitless negotiations which invariably ended in stalemates and impasses? As was stated by this Court, in *N.L.R.B.* v. *American Nat. Ins. Co., supra,* at page 404:

> "Thus, it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position."

The Board, moreover, has recognized the principle of a justified unilateral increase *granted even during an impasse. In Stoner Rubber Co. and Local 629 International Chemical Workers Union,* 123 N.L.R.B. No. 152, the employer was held not to have violated the Act by making a unilateral increase without notice to the Union or instituting a general wage increase at a time when the

Union certification was more than one year old and when an economic strike had been in progress for five months, and the employer was operating his plant with defecting strikers and permanent replacements. One member of the three member majority of the Board held that the employer's unilateral action was justified by its show of a reasonable basis for a good faith belief that the certified Union no longer represented the majority. Two members of the majority held that while the employer's action would be unlawful if the Union actually represented a majority at the time, this was not proved since the presumption of continued majority that derives from the Union's certification was overcome when the employer presented evidence casting serious doubt on the Union's continued majority. Since no evidence was thereafter introduced to prove this majority, the complaint was dismissed.

However, we stress the significant language of Members Jenkins and Fanning, at page 1136 of this decision concurring in part and dissenting in part, at page 1137:

> "• • • It is not our view that any unilateral wage action by an employer, where a bargaining representative is on the scene, is per se indicative of bad faith. Indeed, we can conceive of circumstances, not present here, where such action might not be deemed a violation. • • •" (Emphasis added.)
>
> (Footnote 30. "See e.g. dictum in *N.L.R.B.* v. *Crompton-Highland,* 337 U. S. 217, 224, 24 LRRM 2088, where the unilateral wage action was taken after an impasse in bargaining, and after the same wage offer was made to the striking union and rejected.")

In *Cone Brothers Contract Co.* v. *N.L.R.B.*, 235 F. 2d 37 (C. A. 5), there was an unsolicited raise in hourly wages given to employees during the period when the three bargaining sessions were being held. While there

was no question of an impasse in that case, the court nevertheless, at page 42, stated:

> "• • • Attempting now to compress this into a situation like *N.L.R.B.* v. *Crompton-Highlands Mills*, 337 U. S. 217, 69 S. Ct. 960, 93 L. Ed. 1320; *Armstrong Cork Mfg. Co.* v. *N.L.R.B.*, 5 Cir. 211 F. 2d 843, the Report significantly stated, 'the Examiner does not find that the raise was given with destruction of the Union's majority as its premeditated goal. It was granted to but a part of the group, who had not participated in an earlier raise • • •; those receiving it were persons of proven competence • • •. While the wage raise thus overstepped the bounds of Section 8 (a) (5) • • • the factors pointing to a business necessity for granting the raise puts the matter of actual motive in sufficient doubt for Respondent to be entitled to the benefits thereof.' " (Emphasis added.)

It is important to recall that the Union had been demanding the inclusion of a "prior benefits" clause which involved the continuation of all previous practices in granting wage increases. Thus, even apart from any impasse, it is clear that the Union certainly was not ignored. And the Board misreads the record by its repeated conclusionary assertions (Brief, pp. 11, 12, 16, 17, 18, 19, 20, 21, 22, 25, 27, 32, 34) that the Union was not previously notified or consulted on the changes or that Respondent took the actions before "meeting and conferring" or "full negotiations". To the contrary, there had been constant and continuous discussions about these changes. Such offers to discuss and discussions have been held by the Board to exonerate an employer from a charge of refusal to bargain. Section 8 (a) (5) (*General Electric Co.*, 127 N.L.R.B. No. 51, Apr. 22, 1960). In these circumstances, regardless of a breakdown of negotiations, Respondent granting thereof may not be held to be bad faith bargaining. (*N.L.R.B.* v. *Bradley Washfountain Co.*, 192 F. 2d 144 (C. A. 7).)

We must note again that the Board has refused to hold that Respondent had been guilty of bad faith bargaining. In any event, Respondent could not be guilty of "refusal to bargain" if the Union itself was not bargaining in good faith. (*Superior Engraving Co.* v. *N.L.R.B.*, 183 F. (2) 783 (C. A. 7), Cert. den. 340 U. S. 930.) There is no substantial evidence here that these increases were given solely for the purposes of "discouraging union organization" or with a motive of "destroying" the Union.

As was stated in a similar situation in *N.L.R.B.* v. *Newton Co.*, 236 F. 2d 438 (C. A. 5), at page 446:

> "So too, there were valid reasons other than an effort to discourage union organization, for the pay increase of September 18th. Other plants in the area engaged in like operations were putting wage increases into effect, and it was company policy to pay wages comparable to those of its competitors. At the time of the wage increase to employees of the Newton Company, a like raise was given to the employees of its affiliated companies. We cannot find substantial evidence supporting the Board's finding that the wage increase was motivated by an effort to discourage union participation . . ." (Emphasis supplied).

We have shown that the increases of October, 1956, and January, 1957, were fully justified, not only on the ground that *all of these had been proposed and, in fact, discussed with the Union as subjects of collective bargaining, at various times from the outset of bargaining*, but on the other grounds noted, viz. the impasse produced by the Union and the business necessity of the continuation of Respondent's custom and practice in making merit and regular increases.

Nor can there be any doubt as to the justification for the increase of July and August, 1957. These occurred

after the certification year, and after the repudiation of the Union by the employees in the unit. In comparable circumstances, the Board itself has held that such increases do not result in a Section 8 (a) (1) violation. *Breckenridge Gasoline Co.,* 127 N.L.R.B. No. 176, 46 L.R.R.M. 1205 (June 24, 1960). See also *P. & V. Atlas Industrial Center,* 112 N.L.R.B. 144.

After the expiration of the certification year (July 6, 1957), there was no certified Union with which Respondent could, or indeed, was obligated to bargain.* *Brooks* v. *N.L.R.B.*, 348 U. S. 96, 104; *N.L.R.B.* v. *Minute Maid Corp.*, 283 F. 2d 705 (C. A. 5) (1960); *N.L.R.B.* v. *Superior Fireproof Door & Sash Co. Inc.*, 289 F. 2d 713, 719 (C. A. 2) (April 19, 1961).

POINT III

The Aetna "most favored nation clause" was plainly outside the scope of mandatory bargaining. By seeking to impose this clause as a condition to signing an agreement, the Union was guilty of the bad faith bargaining which produced the impasse.

Respondent has been exonerated by the Board of the charge of bad faith bargaining. In any case, Respondent

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* The Board, in its brief (footnote 30, p. 38) contends that decertification by the employees in July, 1957 was no bar to the relief ordered since the loss of a majority was attributable to Respondent's unfair labor practices, and justified the Board in ordering Respondent to bargain with the Union (citing *Franks Bros.*, 321 U. S. 702). This is an unsupported conclusion, since neither the examiner's intermediate report (I-18-37) nor the Board's decision and order (I-13-18) contained any finding making such an attribution.

Furthermore, the Board's observation ignores the rule applicable here that Respondent was legally justified in taking unilateral action since it is undisputed that it was the Union which broke off relations in May, 1957. (*N.L.R.B.* v. *Sands Mfg. Co.*, 306 U. S. 332; *N.L.R.B.* v. *Andrew Jergens Co.*, 175 F. 2d 130, 136 (C. A. 9), Cert. Den. 338 U. S. 827, Reh. Den. 338 U. S. 882; and *Montgomery Ward Inc.*, 39 N.L.R.B. 229.)

could not have been guilty of a refusal to bargain, if the Union itself was not bargaining in good faith. *Superior Engraving Co.* v. *N.L.R.B., supra.* In point of actual fact, it was the Union that was the guilty party, because of its unyielding insistence on and demand for the Aetna clause, *a subject-matter plainly outside the scope of mandatory bargaining.* Such a clause was neither a permissible nor an obligatory subject of good faith bargaining as defined in Section 8 (d) of the Act, viz: ". . . wages, hours and other terms and conditions of employment. . . ." By reason of its repeated and unlawful insistence on this clause, the Union must be held to have refused to bargain with Respondent. In reality, therefore, it was the Union which violated Section 8 (b) (3) of the Act (the Union counterpart to Section 8 (a) (5)). This unlawful conduct of the Union contributed to the impasse, indeed, was at the root of the difficulties in this case. Yet the Board in its Brief completely ignores this crucial phase of the negotiations.

We must point out in passing that the "Aetna clause" issue did not suddenly emerge late in the negotiations. Nor is Respondent's emphasis on this unlawful demand of the Union for its inclusion in the agreement a mere afterthought. The fact is that the Aetna contract was first considered and discussed on December 5, 1956 at an industry-wide joint meeting with the Union at the New York State Mediation Board (I-74, 75; II-28).

For it is specially important to remember that the Union did more than merely "propose" this Aetna clause—it repeatedly demanded and insisted on the inclusion of it in the agreement, *as a condition of the Union signing any agreement with Respondent.* The imposition of such a condition to the signing of an agreement (where, as here, a non-mandatory subject of bargaining is insisted on) has been condemned by this Court in *N.L.R.B.* v. *Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342 (1958). In *Wooster Div.*, an impasse had resulted because one party (the em-

ployer) had proposed and eventually insisted that a "ballot" and a "recognition" clause be contained in the agreement, and that no agreement would be entered into without such clauses. The Court held that neither clause was within Section 8 (d) defining "collective bargaining" as referring to the subjects of "wages, hours and other terms and conditions of employment." As was stated by Mr. Justice Burton at page 349:

> ". . . Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But it does not follow that, because the company may *propose* these clauses, it can lawfully *insist upon them as a condition to any agreement.*" (Emphasis supplied.) (See also *N.L.R.B.* v. *Int. B. of E. Workers,* 266 F. (2) 349 (C. A. 5).

Similarly, the Board has held that where a Union is adamant in demanding the same contract it has obtained from employers in a neighboring city, an employer cannot be charged with refusal to bargain, when an impasse results solely from the rigid position of the Union. *E. L. Anderson,* 103 N.L.R.B. 1711. Indeed, under such circumstances an employer may abstain from further negotiations. *N.L.R.B.* v. *Cambria Clay Products Corp.,* 215 F. (2) 48 (C. A. 6); *N.L.R.B.* v. *Norfolk Shipbuilding & Dry Dock Co.,* 195 F. (2) 632 (C. A. 4); *N.L.R.B.* v. *Remington Rand,* 94 F. (2) 862 (C. A. 2).

If it was the Union's unlawful insistence on the Aetna clause that contributed to the impasse (which justified the unilateral actions of Respondent) it is difficult to understand how in the face of the Board's *exoneration of Respondent of bad faith bargaining,* it could nevertheless be charged with violating Section 8 (a) (1) ("interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7").

It is this glaring inconsistency in the Board's findings that the Court of Appeals subjected to such sharp scrutiny,

reaching the correct conclusion that an employer's "good faith" is the sole test to determine a Section 8 (a) (5) violation, and that a violation of Section 8 (a) (1) may not be "derived" from the Section 8 (a) (5) violation in the absence of further evidence that the Respondent failed to act in good faith (289 F. (2) 700, 707).

POINT IV

Since, during the past five years and eight months the employees' wishes as to representation have never been officially canvassed, enforcement should be denied unless the Board orders an election to ascertain whether the Union is at present the choice of the majority.

Violations allegedly occurred in 1956 and 1957, but hearings on the charges against Respondent were not held until January, 1959. More significantly, however, *five and one-half years have elapsed* without any attempt by the Board to determine whether the Union still represents a majority of the employees in the unit in question. The Union was certified on July 5, 1956. *Since that date, no election has been held. No agreement has ever been signed.* Can the Board, in March, 1962, creditably assert, with any pretense of sincerity, that Respondent is violating the Act by "interfering with, restraining or coercing its employees in the exercise of their right to organizational and collective bargaining rights" (Section 8 (a) (1)), or is "refusing to bargain collectively with the representatives of his employees . . ." (Section 8 (a) (5)), in the face of the fact that to this very day neither the Board nor the Union has officially established whether a majority of the employees ever wanted the Union at all?

We can only suggest, with the utmost respect, that when the Board digs up the long-forgotten bones of a controversy, which occurred in 1956 and 1957 and resulted in protracted and unsuccessful bargaining with a discredited Union (thus allowing that Union to latch on to and become the beneficiary of an enforcement proceeding which has long since become something in the nature of beating a dead horse), it undermines and discredits the labor-management administrative process itself. It should not be forgotten that the employees repudiated the Union back in July, 1957.

Accordingly, we must note the decision in *N.L.R.B.* v. *Adhesive Products Corp.*, 281 F. 2d 89 (C. A. 2) (1960), where, similarly, there was a claim of representation "during a period of confusion and vacillation" (p. 92), indeed where four separate unions at one time contended for the representation, and where, upon the assertion of a union representative made in 1955, it made the absurd claim of being the representative of a majority in 1960. The Court stated, at page 91:

> "Under these circumstances what relief is best calculated to give to the employees the rights to which they are entitled? First, they should not be made the pawns of any union, the company, or of the Board. Second, they should have an opportunity to express their choice in the manner provided by law."

And at page 92:

> "Keeping in mind the policy of the Act, namely, to encourage collective bargaining through representatives of the employees' own choosing (29 U.S.C.A. Sec. 151), the Board and this court should endeavor to make this goal attainable. The most feasible procedure would appear to be that suggested by Judge Learned Hand in *N.L.R.B.* v. *National Licorice Co.*, *supra*, and followed by Judge A. N. Hand in *N.L.R.B.*

v. *American Mfg. Co., supra*, namely, to grant enforcement of Section 1 (a), (c) and (e), to deny enforcement of Section 1 (b) and (d) and Section 2 (a)-(e) and to make the order 'conditional upon the Board's ascertaining by a new election whether the Union is now the choice of the majority.' In this way the current wishes of the employees can manifest themselves under the aegis of the Board's supervision. An enforcement order should be entered to the extent indicated in the foregoing opinion." (Emphasis supplied.)

In a case, companion to the one here, and involving the same Union, Local 66 (*N.L.R.B.* v. *Superior Fireproof Door & Sash Co. Inc.*, 289 F. 2d 713 (C. A. 2) (April 19, 1961, Pet. for Reh. Den. 289 F. 2d 724), the Court of Appeals followed the practice established in *Adhesive Products, supra*, and held (p. 725) that the inordinate delay* of the Board's disposition of the proceeding was

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* At page 723 the Court compared the average time lapse between filing of a charge and final decision of the Board, of 475 days, with the time lapse in *Superior Fireproof Door & Sash Co., Inc., supra*, viz.: 1,015 days. In the case at bar, the lapse between the charge (Apr. 16, 1957) and the decision and order of the Board (Jan. 22, 1960) was 1,010 days.

On this subject we are happily in accord with the statement made in 1958 by Professor (now Solicitor General Cox) in "The Duty to Bargain in Good Faith", 71 Harvard Law Review, 1401, at pp. 1439, 1440: "* * * it is doubtful whether much is gained by retrospective review of the negotiations, however, when the parties have actually bargained together * * * If the contract is too one-sided, the loser may file unfair labor practice charges. A year or two later the N.L.R.B. may determine that Section 8(a)(5) or Section 8(b)(3) was violated. After another twelve months more or less, the Courts may enforce the N.L.R.B. decision. *Will the decision accomplish anything at this late date?* During the interval, the parties will have had to go about their business. Conditions change. Relationships develop. I wonder whether the bargains struck, despite 'misconduct' in the course of the negotiations, are not more likely to be more viable *than any formal legal document addressed to a situation which is two or three years outdated.* * * *" (Emphasis supplied.)

the principal ground for its granting enforcement conditionally, upon the Board's holding an election within 60 days after the Court's order became final, to determine whether the bargaining unit in question wishes to be represented by Local 66.

It is respectfully submitted that the identical form of relief is appropriate for the case here.

CONCLUSION

The judgment of the Court of Appeals should be modified to the extent of including a direction that enforcement should be granted only on condition that after an election ordered by the Board, it is found that the Union still represents a majority of the unit in question, and as modified, affirmed.

Respectfully submitted,

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Dated, New York, March 12, 1962.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either

party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4)

shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representatives, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *